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In The

Supreme Court of The United States

October Term, 1994

PETER W. SLUYS,

Petitioner,

ARTHUR R. ALDRICH,

Petitioner,

v.

JOHN T. GRANT,

Respondent,

KENNETH GRIBETZ, as District Attorney of the County of Rockland, and KENNETH GRIBETZ, personally, PETER MODAFERRI and SIX OTHER UNKNOWN CONSPIRATORS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Are newspaper publishers, reporters and editors threatened with prosecution for decisions that are protected by the First Amendment to the Constitution of the United States entitled to a trial by jury on their complaint that the District Attorney of the County of Rockland [whose indictment is now pending before the United States District Court for the Southern District of New York] conspired and acted to deprive them of rights protected under the Constitution of the United States?

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Petitioners, Peter W. Sluys and Arthur R. Aldrich, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit refusing to grant a jury trial as required by the Seventh Amendment to the United States Constitution for the violation of the civil rights of petitioner newspaper reporters and editors by the District Attorney of the County of Rockland, on the ground that such claim was moot or that the petitioners had not suffered damages.

OPINIONS BELOW

The unpublished written opinion of the United States Court of Appeals for the Second Circuit appears as Appendix A to this Petition. The opinion of the United States District Court is reported as *Sluys v. Gribetz*, 842 F.Supp. 764. The unpublished Order denying a rehearing is attached as Appendix C to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on September 29, 1994. A timely Petition for Re-Hearing was filed on October 11, 1994. The Court of Appeals' denial of the Petition for Re-Hearing was issued on November 2, 1994, and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments I and VII to the United States Constitution are set forth in Appendix D.

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York had jurisdiction pursuant to 42 U.S.C. Section 1983 and 18 U.S.C. Section 241.

In August of 1993, District Attorney Kenneth Gribetz attempted to charge journalists Peter W. Sluys and Arthur R. Aldrich with violations of the New York State Penal Law, particularly with the charge of commercial bribery and commercial bribe receiving. Gribetz issued Grand Jury Subpoenas against Community Media Inc. [Petitioners' employer] and Subpoenas to Peter W. Sluys. In addition, Gribetz published a press release saying that the Petitioners would be charged with violation of these criminal statutes, and that Petitioners were guilty of criminal acts in that they agreed not to write critical stories about Orange & Rockland Utilities in exchange for advertising money.

In fact, Gribetz had brought on this action against Community Media Inc. in order to imprison Sluys and Aldrich, and in order to put Community Media newspapers out of business for the political gain of himself and his supporters.

However, unknown to Gribetz in June of 1993, the Federal Bureau of Investigation and the Criminal Investigation Division of the Internal Revenue Service began an investigation into the activities of Gribetz's office, for obstruction of justice, defrauding the United States, accepting kickbacks, and other criminal acts under New York State and Federal Law. Gribetz has now been identified as the target of the investigation, and his indictment is expected to be handed down shortly.

It was in this atmosphere of complete corruption of the political process and the District Attorney's office in Rockland County that Petitioner journalists turned to the United States District Court for protection against prosecution by the District Attorney.

Realizing full well that the doctrine of abstention generally precluded Federal Court intervention in State Criminal Court matters, Petitioner Sluys nonetheless brought an action before the United States District Court [Brieant, J.] under 42 U.S.C. Section 1983, arguing that the prosecution proposed by the District Attorney's office violated the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and Article I, Section 8 of the New York State Constitution.

Thereafter, Sluys [Managing Editor of three weekly newspapers] moved the District Court for an Order pursuant to 28 U.S.C. Section 2282 to stay the proposed prosecution.

The District Court denied the injunction without prejudice, after warning the District Attorney that the prosecution was clearly violative of the First Amendment.

In late November, 1993, Gribetz dropped the prosecution of the Petitioners herein, saying that such a prosecution was "clearly prohibited by the First Amendment to the Constitution of the United States."

Thereafter, and after a hearing on December 8, 1993, Judge Brieant mooted the civil rights lawsuit, holding that Gribetz had ceased his prosecution after the Court hearing of October 25, 1993 and thus escaped liability for damages.

Thereafter, the decision of the District Court was appealed to the United States Court of Appeals for the

Second Circuit, and on September 29, 1994 that Court handed down its unpublished decision and order affirming Judge Brieant.

In pertinent part, the Court of Appeals said that "There was no finding that plaintiff's constitutional rights were violated; on the contrary, Judge Brieant found that, as the investigation had scarcely begun, the plaintiffs' rights had not been violated."

Petitioners argued before the Court of Appeals that the District Court improperly held that the lawsuit was moot, even though the District Attorney had clearly damaged your Petitioners. In so acting, both the District Court and the court of Appeals did not vindicate the constitutional rights of Petitioners editors and reporters herein. Rather, the District Attorney was simply warned away from conduct that was illegal and unconstitutional, and not punished for that activity and the damages he had already caused.

The Court of Appeals, in affirming the District Court, acted against its own standard of review, and violated the established precedents of the Court of Appeals for the Second circuit and this Honorable Court.

REASONS FOR GRANTING THE WRIT

The First Amendment is preeminent among the Bill of Rights [*Sluys v. Gribetz*, 842 F.Supp. 764].

This Court on more than one occasion has held that "The First Amendment ... prohibits the State from interfering with the communicative processes through which its citizens exercise and prepare to exercise their rights of self-government. And the Amendment shields those who would censure the State or expose its abuses." (*Herbert v.*

Lando, 441 U.S. 153 at 184 - 185 (1979)).

When a corrupt District Attorney - as part of his attempt to stay in office - attempts to use the State criminal laws to close down a newspaper that he perceives to be a political danger, the rights guaranteed to editors and publishers by the First Amendment are violated.

When a corrupt District Attorney attempts to use the criminal law of the State of New York to quash dissent by using illegal Grand Jury Subpoenas, issuing press releases that editors and publishers are about to be charged with crimes, and that a newspaper group has violated the law, then the First Amendment is offended.

And when the District court simply warns the District Attorney to stop interfering with rights guaranteed by the First Amendment, and does not allow those editors and publishers their day in court to present their grievances about the District Attorney's conduct to a jury, then both the First and Seventh Amendments are offended.

Damages must issue in this case as office holders must learn that they cannot prosecute newspapers for decisions on what should be printed and what should not.

We had thought the lesson learned in 1737 when the lawyer for journalist John Peter Zenger wrote "An evil magistrate, entrusted with the power to punish words, is armed with a weapon the most destructive and terrible." [Attorney James Alexander quoted in Buranelli, The Trial of John Peter Zenger, New York University Press 1957].

Particularly in the circumstances of this case - where the actions of the District Attorney amounted to a clear violation of civil rights by prosecutorial misconduct -

prosecutors should learn that those who deprive others of their First Amendment rights will be called before the bar of justice, and asked to pay for that deprivation.

A finding of a violation of the First Amendment absolutely entitles the Petitioners as a matter of law to damages, whether those damages are nominal, compensatory or punitive.

With this proposition the Court of Appeals did not disagree, but said - in effect - that a District Court Judge has the authority to determine before discovery, without witnesses being sworn, and merely on the say-so of lawyers asked to comment before the bench, that rights had or had not been violated.

If the Seventh Amendment guarantee of a trial means anything, it means that there should be a full and fair right to discovery, so that actions hidden from the view of the District Court and from the people of the State of New York can be discovered, and made part of the cause of action for damages herein.

In *Carey v. Piphus* (435 U.S. 247) this Court held that a denial of procedural due process entitled a plaintiff to nominal damages.

"Insofar as petitioners contend that the basic purpose of a Section 1983 damages award should be to compensate persons for injuries caused by deprivation of constitutional rights, they have the better of the argument. Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." [*Carey*, at 435 U.S. 254].

Justice Powell went on to write that "The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available under that section for actions found ... to have been violative of ... constitutional rights, and to have caused compensable injury..." [citing *Wood v. Strickland*, 420 U.S. 308 at 319, rehearing denied 421 U.S. 921].

The commentators have argued that:

> Even without proof of any actual injury or loss, nominal damages are unquestionably available for a deprivation of procedural due process, and they should also be available whenever a constitutional right is infringed. [citing *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2nd Cir. 1978)].
>
> The significance of the availability of nominal damages should not be overlooked. It means for example that summary judgment cannot be granted against the plaintiff simply because the defendant's unconstitutional conduct does not cause any actual harm. Cases otherwise subject to dismissal as moot may be saved [citing *Ellis v. Blum*, 643 F.2d 68 (2nd Cir. 1981)] and a nominal damages award also justified the imposition of attorney's fees and costs to the defendant, even though the plaintiff failed to prove any actual injury necessary to sustain [such] an award. [See 2 Cook & Sobieska, Civil Rights Action, para. 4.07 at 4-50 to 4-51 (1993)].

In the case at bar, Judge Brieant suggested that the petitioners were to be considered "prevailing parties, and

were they represented by attorneys, an award of attorney's fees might be appropriate." [*Sluys v. Gribetz*, 842 F.Supp. 764 at 768].

Can it be said that the requirements of the First Amendment and Seventh Amendment are satisfied without any damage award - no matter how nominal - simply because petitioners were capable enough to invoke Federal jurisdiction to block a State criminal prosecution before that State criminal prosecution was advanced? The protection of rights guaranteed by the Constitution and substantive and procedural due process require far greater respect than this.

This is the first time in the last 257 years of United States history that a prosecutor has reached into a newsroom to attempt to prosecute editors for decisions which the First Amendment and the cases decided thereunder say are decisions that must be made by editors alone.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." [*Marbury v. Madison*, 5 U.S. 137 and 163 (1803)].

Justice Louis Brandeis, writing in dissent in *Olmstead v. United States* [277 U.S. 438 at 485] got to the heart of the problem in this case when he wrote "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution."

Again, this Court has held that "The philosophy that

constitutional limitations and legal restraints upon official action may be brushed aside on the plea that good, perchance, may follow, finds no countenance in the American system of government." [*Jones v. SEC*, 298 U.S. 1 at 237 (1936)].

In the Court of Appeals, Judge Pierre Leval agreed with Petitioners that Petitioners had standing in this case, and had standing when the matter was appealed to the Court of Appeals. If that is so, the case was not moot, and it is only mootness upon which Judge Brieant dismissed the case.

As a matter of law, mootness "is the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence." [*United States Parole Commission v. Geraghy*, 445 U.S. 388 at 397]. If Standing continued, the case was not moot and the matter should be reversed for trial.

It is clear that the District Attorney had committed offenses which violated the civil rights of your Petitioners. Among other acts, Gribetz issued Grand Jury Subpoenas without a Grand Jury sitting, a clear violation of the Petitioners' civil rights under New York law. He compelled the Petitioners to spend money for legal fees, and damaged the reputation of Petitioners by the issuance of a press release stating they were under investigation. The issuance of the press release was intended to chill the rights of Petitioners to publish and write their newspapers. Indeed, the court below noted that "The complaint fairly pleads an intent to coerce and an intent to chill the rights of plaintiffs under the First Amendment, and to interfere with the right of the newspaper to publish editorials ..." (*Sluys v. Gribetz*, 842 F.Supp. 764).

Since the complaint was fairly pleaded and the matter

was not moot because the Petitioners have standing, then the Seventh Amendment requires that Petitioners must and should be able to present their request for damages to a jury of their peers.

Thus, it is clear that the Court of Appeals for the Second Circuit misinterpreted the standard of review, as that court was required to "accept all material allegations of the application as true. We also recognize that, when ruling on standing, the court must examine the subset of issues to discover whether there is a nexus between the alleged injury and the claim sought to be adjudicated in a Federal Court." [*Matter of Appointment of Independent Counsel*, 766 F.2d 70 at 74 (2nd Cir. 1985), cert. denied sub nom *Schiavoni v. United States*, 474 U.S. 1020].

The decision of the Second circuit was also in contradiction to well established case law as set forth in *Ellis v. Blum* (642 F.2d 68 (2nd Cir. 1981)) where - at 83 - that court said that "This claim for damages flowing from the telephonic and written pre-termination notices saves the action from the bar of mootness, provided it is not so insubstantial or so clearly foreclosed by prior decisions that this case may not proceed."

There has never been a case like this before, because never in the history of American jurisprudence has a corrupt District Attorney ever attempted to act against a group of newspapers that he feared. The entitlement to nominal and compensatory damage in this case is absolute.

More than a half century ago it was realized that the United States Supreme Court does not sit as a court to correct errors in cases where there are no novel or important principals of law and no elements of great public interest at stake. However, this Court has always been open for the

vindication of rights under the Constitution, and where judges are motivated by a feeling that the decision below represents a gross miscarriage of justice or a subtle erosion of a legal principle, to be corrected.

The District Attorney's conduct offends basic concepts of American justice and is certainly subject to punitive damages. The Petitioners clearly have the right to claim punitive damages under the doctrine of *Smith v. Wade*, 461 U.S. 30 (1983).

In *Smith* this Court held that "A jury may be permitted to assess punitive damages in an action under Section 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involved reckless or callous indifference to the federally protected rights of others. We further hold that this threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness."

Here, it is clear that the acts of Mr. Gribetz involved "reckless or callous indifference to the federally protected rights of others."

Again, this Court may consider such injuries as impairment of reputation, personal humiliation and personal anguish and suffering in a Section 1983 action. [*Memphis Community School District v. Stachura*, 477 U.S. 299 (1986)].

Whenever civil rights are violated, this Court has reaffirmed that at the least there is an entitlement to nominal or compensatory damages, [*Farrar v. Hobby*, 506 U.S.____, 113 S.Ct. 566].

This Court should grant certiorari here to explicitly

rule that Petitioners are entitled to a trial of their claims under 42 U.S.C. Section 1983, if compensatory, nominal, or punitive damages should be granted, and further, to correct the decision of the United States Court of Appeals herein, which has so far departed from the accepted and usual course of its decisional law in this matter - and sanctioned such a departure by a lower court - as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and order of the Court of Appeals of the Second Circuit in this matter.

If this Court elects not to address the issues presented in this Writ at the present time, it is requested that the Writ issue and that the matter be remanded to the United States District Court for a determination of whether nominal, compensatory, or punitive damages should issue in light of this Court's decisions in *Smith*, supra, and *Memphis Community School District*, supra.

Dated: January 27, 1995
Pearl River, N.Y.

Respectfully Submitted,

PETER W. SLUYS
Petitioner Pro Se

ARTHUR R. ALDRICH
Petitioner Pro Se

Appendix A

SDNY
89-cv-740
Brieant, J.

PNL UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of September, one thousand nine hundred and ninety-four.

Present:
Honorable George C. Pratt
Honorable Pierre N. Leval
Honorable Guido Calabresi
Circuit Judges.

ORDER
94-7325

PETER SLUYS, Esq.,
Plaintiff-Appellant,

ARTHUR R. ALDRICH,
Plaintiff-Appellant,

v.

JOHN T. GRANT ,
Defendant,

KENNETH GRIBETZ, as District Attorney
of the County of Rockland, and
KENNETH GRIBETZ, personally, PETER MODAFERRI
and SIX OTHER UNKNOWN CONSPIRATORS,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York (Charles L. Brieant, Judge).

This cause came on to be heard on the transcript of record from the United States District Court and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of the district court is affirmed.

Plaintiffs appeal a judgment of the United States District Court for the Southern District of New York (Brieant, J.) dismissing their action.

The plaintiffs-appellants are editors/publishers of three Rockland County newspapers, who brought an action under 42 U.S.C. § 1983 against the District Attorney of Rockland County and others, seeking, in part, to enjoin the District Attorney from investigating in the grand jury whether plaintiffs had committed acts of commercial bribery relating to the editorial policy of their newspapers.

Plaintiffs had moved in district court for a preliminary injunction to stop the district attorney's investigation, contending that the investigation was an attempt to silence their unfavorable newspaper coverage of former County Executive John Grant. Finding that no constitutional violation had occurred in the incipient stages of the investigation, Judge Brieant denied the motion for a preliminary injunction, while allowing plaintiffs leave to renew the motion upon the showing of any subsequent conduct that violated their First Amendment rights. Shortly thereafter, the District Attorney announced that the investigation had concluded. He asserted that "constitutional problems" made such a prosecution impossible. No charges were ever filed, and apparently no evidence was ever

presented to a grand jury. Judge Brieant then invited a showing why the action should not be dismissed as moot, and, following submissions, dismissed the action.

The appellants base their appeal on the proposition that, because Judge Brieant held that the defendants had committed a violation of the First Amendment, "the District Court was duty bound to allow the matter to proceed to trial to allow a jury to determine whether nominal, compensatory, or punitive damages were allowable."

The appellants are wrong. There was no finding that plaintiffs' constitutional rights were violated; on the contrary, Judge Brieant found that, as the investigation had scarcely begun, the plaintiffs' rights had not been violated. The court stated, "One of the problems is that nothing, as far as I can see, has happened to [plaintiffs]...[T]here's no indication of anything inappropriate up till now."

It appears that plaintiffs-appellants are misinterpreting a subsequent observation made by Judge Brieant upon his dismissal of the action.

In his memorandum and order of January 31, 1994, dismissing the action, Judge Brieant expressed the view that an investigation into whether a newspaper had "sold" its editorial policy as part of a corrupt bargain would inevitably "intrude into the editorial judgment protected by the First Amendment of Constitution"; he noted that the defendant District Attorney had wisely and correctly decided to drop his plans to investigate because the First Amendment would prevent a successful prosecution; Judge Brieant then concluded he would consider plaintiffs "the prevailing parties," who might have been entitled to legal fees under 42 U.S.C. § 1988, had they been represented by counsel.

The appellants misinterpret this last remark. Because Judge Brieant described them as "prevailing," they conclude an implied finding that they had shown a violation of their rights. (Appellants' Brief, p. 7, 9)

That is not what Judge Brieant said or meant. Indeed, as noted above, he had said the opposite.

The reason Judge Brieant noted that he would consider plaintiffs the prevailing parties is because, by bringing their lawsuit, they had induced the District Attorney to abandon the investigation. Accordingly, by bringing their suit, they accomplished at least one of its goals. That arguably made them the prevailing parties in the sense intended by § 1988, regardless whether they could demonstrate that any right of theirs had been violated. See LaRouche v. Kezer, 20 F.3d 68, 71 (2d Cir. 1994).

As Judge Brieant found that appellants' rights had not been violated, the basis of their appeal is mistaken. The judgment of the district court is affirmed.

Hon. George C. Pratt, U.S.C.J.

Hon. Pierre N. Leval, U.S.C.J.

Hon. Guido Calabresi, U.S.C.J.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civ. 6704 (CLB)

PETER W. SLUYS, and ARTHUR R. ALDRICH,

Plaintiffs,

-against-

Memorandum and Order

KENNETH GRIBETZ, AS DISTRICT ATTORNEY OF THE COUNTY OF ROCKLAND, and KENNETH GRIBETZ, PERSONALLY, PETER MODAFFERI, JOHN T. GRANT and SIX OTHER UNKNOWN CONSPIRATORS,

Defendants.

Brieant, J.

This civil rights action was filed pro se on September 24, 1993, by plaintiff Peter W. Sluys. Arthur R. Aldrich was permitted to become an additional plaintiff by order dated November 16, 1993.

The defendants are the Hon. Kenneth Gribetz individually, and as District Attorney of the County of Rockland, State of New York, in this District; Peter Modafferi, individually, and as a criminal investigator employed in the office of Mr. Gribetz; and John T. Grant, the County Executive of the County of Rockland through December 31, 1993.

By order issued November 17, 1993, by the Court on its own motion, and returnable December 1, 1993, the parties were, "invited to show cause why this action should not be dismissed by this Court as moot by reason of intervening events". By motion dated November 15, 1993, defendant Grant moved pursuant to Rule 12(c) F.R.Civ.P. for judgment on the pleadings. This motion was fully submitted for decision as of December 8, 1993 following a dispute because Plaintiff was willing to discontinue against Mr. Grant "without prejudice", and counsel for Mr. Grant demanded a dismissal "without prejudice". The "six other unknown conspirators" mentioned in the caption of the case remain unknown, and there is no persuasive evidence that any such exist.

The Plaintiffs are editors and/or publishers affiliated with Community Media, Inc., which owns three local newspapers known as Our Town, The Clarkstown Courier, and The Rockland Independent, which papers circulate in the County of Rockland. Mr. Sluys is a former member of the Bar. By his complaint filed February 24, 1988, plaintiff alleged that defendants Gribetz and Modafferi, acting under color of state law because of their official positions, caused him to be invited to the Office of the District Attorney for an interview on August 2, 1993. At this interview according to plaintiff, Sluys (¶ 21 et seq. of Complaint) was told by defendant Modafferi that he was, "going to jail unless you turn over on Knight (another editor for Community Media, Inc.) and Aldrich"; that he was in "deep shit", and that as a "predicate felon" plaintiff would go to jail for quite some time unless he immediately confessed to taking a bribe from

Orange & Rockland Utilities.[1] Plaintiff Sluys alleges (¶ 27) that he was, "asked to wear a wire and meet with Linda Winikow (then an executive with Orange & Rockland Utilities)", and to tell Winikow on the wire that, "I know you have been bribing us", or alternatively, "I know we have been blackmailing you." Plaintiff refused to do either.

The District Attorney's Office obtained voluntarily from Community Media all files having to do with advertising of Orange & Rockland Utilities. The Complaint details additional efforts to obtain the assistance of plaintiff and of Aldrich as witnesses, or in the case of plaintiff, as an undercover investigator, and it is alleged that Modafferi threatened to ruin Aldrich's reputation (¶ 38). The Complaint also alleges a "conspiracy" and that the actions of Modafferi and Gribetz were, "initiated or acted upon at the request of defendant Grant...in part as punishment for the fact that Community Media newspapers had been supporting Samuel Colman against Grant in the 1993 Democratic primary for County Executive."

The Complaint continues, alleging further activities said to be in violation of the civil rights of the plaintiffs, or the First Amendment Rights of Community Media, Inc. Before proceeding further with the Complaint, however, some additional background is necessary.

Ms. Linda Winikow, not a party to this action, formerly served as a Democratic Member of the New York State Senate representing parts of the Counties of Rockland and Westchester. Thereafter, she accepted full time

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[1] The use of vile and abusive language is never a basis for a civil rights action. Batista v. Rogriguez, 702 F2d 393, 395 (2d Cir. 1983)

employment with Orange & Rockland Utilities, a regulated public utility which provides electric and gas service in parts of Rockland County. Thereafter, and at all relevant time until her suspension with pay on August 17, 1993, Ms. Winikow served Orange & Rockland Utilities as Vice President for Corporate Policy and External Affairs.

A contested primary in the Democratic party developed in 1993 between defendant John T. Grant and one Samuel Colman, a member of the New York State Assembly and not a party to this action. Mr. Colman's candidacy was supported by Ms. Winikow and also by these plaintiffs and their publications. Mr. Gribetz, it is alleged, was partial to the candidacy of Mr. Grant. Mr. Grant was the victor in the primary by a narrow margin and, as is so often the case following such internecine strife in a political party, he was defeated at the general election by the Republican candidate and departed the Office of County Executive on December 31, 1993.

On the day following the suspension with pay of Ms. Winikow as Vice President for Corporate Policy and External Affairs of Orange & Rockland Utilities, District Attorney Gribetz announced (Complaint, ¶ 42) that his investigation concerning the financial affairs of Orange & Rockland Utilities,

> "has expanded into allegations of commercial bribery with respect to the awarding of a $41,000 per annum contract between Orange & Rockland Utilities and Community Media, Inc.

Gribetz stated that,

> "media contracts were awarded from the

> Corporate Communications Department at Orange & Rockland Utilities, which was directed by Linda Winikow, Vice President for Corporate Policy and External Affairs until her suspension with pay on August 13, 1993."

Gribetz stated that,

> "Our Town had published a series of articles which were highly critical of Jim Smith, the C.E.O. of Orange & Rockland Utilities and Vice President Linda Winikow. The articles were critical of their salaries, expense accounts, pensions, and fringe benefits."

Gribetz stated that,

> "Subsequent to the publication of these articles, on July 21, 1992, a contract was entered into in the amount of $41,600.00 for advertising, per annum, between Orange & Rockland Utilities and Community Media, Inc. No such articles have appeared in Community Media, Inc.'s newspapers after July 21, 1992."

Gribetz further stated that,

> "The contract was renewed for a second year in the amount of $41,600.00 on March 8, 1993. Payment for the first contract was paid in full, in advance. Gribetz stated that although the payment was made in full, Orange & Rockland Utilities failed to supply advertising to the newspaper totaling the

contract amount."

The release continued, and pointed out that Grand Jury Subpoenas had been issued, and that the utility was, "one of the largest advertisers for Community Media, Inc."

Other newspapers printed the release, and radio news broadcasts repeated the charge that Sluys was guilty of commercial bribe receiving.

Contemporaneous publicity releases by Orange & Rockland Utilities denied any inappropriate arrangements with Community Media and noted that the utility, "buys ads from time to time from many different media outlets". (Donovan press release attached to complaint)

At the same time that all of this was going on, Ms. Winikow was also under investigation by the District Attorney for having caused vendors of Orange & Rockland Utilities to make payments in goods or services to the Colman primary campaign as a condition for the continued receipt of business from the utility, and to have engaged in other diversions of funds of her employer. These activities are alleged in some detail in companion litigation pending in this Court in the nature of a Class Action by ratepayers (Feiner v. Orange & Rockland Utilities, Inc., et al., 93 Civ. 5796 (CLB)), and a RICO action brought by the utility itself against Ms. Winikow and others, 93 Civ. 6038 (CLB). In the latter case, Orange & Rockland Utilities as plaintiff charged Ms. Winikow and other employees of Orange & Rockland with having participated in the affairs of the enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962 in that Winikow and others, with the aid of corrupt vendors, defrauded the utility by diverting funds totaling over $125,000 to enrich the individual defendants, or

pay their personal expenses or engage in political contributions, including $5,000 to United States Senator Joseph Lieberman of Connecticut' $10,000 in printing services for New York State Assemblyman Sam Colman and defraying the costs of the engagement party for Winikow's son, Jeffrey, the printing of business cards and stationery for her son's law firm; printing for advertisements for one Hansen, a candidate for the Rockland County Legislature; and, contributions to various other candidates for public office, many of them in trivial amounts.

The Complaint alleges that the District Attorney also investigated allegations that certain school districts had given legal advertising to Community Media and its newspapers, "in order that Community Media not publish unfavorable articles about them", and also investigated a purported extortion of Dr. Richard Alcott.

The Complaint alleged that these investigations were improper as a matter of law and caused in whole or in part not by a good faith belief that there had been any violation of the criminal law, but rather were done at the instance of Grant, or Grant's supporters and "operatives". (¶ 53). The Complaint alleges (¶ 58) that the investigations were intended, "to effect [sic] the reporting of stories about County Executive John Grant", and to, "discredit plaintiff and plaintiff's stories in the eyes of the general public, and to aid in the defeat of Samuel Colman as a candidate in the Democratic primary." (¶ 58).

Further reference to the detailed allegations of the Complaint are not necessary for the purposes of this decision, and familiarity with that document containing seventy-seven separately numbered paragraphs exclusive of the prayer for relief, must be assumed. The Complaint fairly pleads an intent to coerce and an intent to chill the rights of

plaintiffs under the First Amendment, and to interfere with the right of the newspaper to publish editorials in support of Colman and investigative reports about Grant.

It is claimed that Mr. Grant conspired with or requested Gribetz to engage in the violative conduct, and that this constituted an actionable conspiracy by Grant. Obviously, Grant has no power to convene a Grand Jury, or to prosecute Sluys, Aldrich, or Community Media, and there is no contention to the contrary. Ordinarily, private citizens have the right to seek the redress from public officials for real or fancied wrongs, and if the public official thereafter violates anybody's Constitutional rights, the private person who activated that official is ordinarily not liable under the civil rights laws on a conspiracy theory. The entire theory of a conspiracy is that two or more persons are acting together to effectuate an unlawful purpose. This assumes an agreement so to act, either by express assent or by inference from conduct. Under such a conspiratorial agreement, different members of the conspiracy agree to and do perform different acts, each within their powers and abilities, to obtain a common result. Mere suggestion or request of the sort alleged against Grant does not make him a conspirator, and as noted earlier, under the circumstances of this case there is no way in which Grant could have done or helped to do any of the acts which were the objects of the so-called Grand Jury conspiracy. Citizens urging action by public officials are presumed to intend that the official will act lawfully. It was impossible for Grant to have played any part in the particular conspiracy alleged, because he had no power to do so.

On October 6, 1993, Linda Winikow appeared with her attorney and District Attorney Gribetz before the Hon. Robert R. Meehan, Acting Justice of the Supreme Court of the State of New York, County of Rockland, and waived

indictment as to three separate informations. In connection with her pleas of guilty to all three charges, Ms. Winikow testified under oath. She admitted that as to the first charge, between March 1, 1993 and August 11, 1993 she stole U.S. currency in excess of $3,000 from Stanford Silverman, the President of Devotion, Inc. by instilling in him a fear that if he did not pay she or another would perform an act calculated to harm Mr. Silverman with respect to his business by terminating Devotion's advertising contract with Orange & Rockland Utilities. Devotion, Inc. was said by her to be an advertising agency for designing and placing advertising, and a vendor with whom Orange & Rockland did business during the relevant time period, receiving business from the utility in the amount of approximately one million dollars in 1992-93. Ms. Winikow also admitted that she asked Mr. Silverman to make political donations on behalf of Orange & Rockland Utilities by donating money to, "various political campaign committees", and told him that he would lose Devotion's contract with Orange & Rockland, "if he did not make $25,000 worth of personal expenses and political contributions on behalf of Orange & Rockland per year". (Transcript of Plea at p. 14, annexed as Exhibit to Document 10 in this case)

As to the second charge, Ms. Winikow testified that on or about and between March 18, 1992 and July 21, 1993 she, being an employee of Orange & Rockland Utilities, without the consent of her employer, accepted or agreed to accept a benefit "to wit, cessation of negative press coverage negative press about Orange & Rockland Utilities, Inc. from another person, to wit, [plaintiffs] upon an agreement or understanding that such benefit would influence her conduct in relation to her employer's or principal's affairs, to wit, by entering into an advertising contract with ... Community Media, Inc. ...".

Ms. Winikow testified in detail at her arraignment that plaintiffs' publication printed articles which were, "very negative and primarily about some of the perks as well", concerning herself and Mr. Smith, the President and Chairman of the Board, and about the utility. She testified that she never would have engaged in the advertising contract were it not for the negative press coverage which she, Mr. Smith and the utility had received, but that she did not have the consent of her employer when she entered into this contract.

In connection with the third charge, Ms. Winikow testified that between March 1, 1992 and April 28, 1992 she made a contribution on behalf of Orange & Rockland Utilities to, "The Friends of Sam Colman Committee" in a name other than the true contributor by having Midland Park Graphics, Inc., an Orange & Rockland vendor, appear to be the contributor, and also print campaign and related material for use at the Colman Committee fundraiser, valued at $2,379, the expense of which was paid by the utility. Under the same charge she admitted a further contribution under the name of Midland Park Graphics, Inc. by having that concern issue a check to the Colman Committee in the amount of $1,485, and that midland Park Graphics was reimbursed by Orange & Rockland Utilities for that check. Furthermore, she admitted that a further campaign contribution was made under the name of Maxine Epstein, and another by Mark DeBlasio, in each case by having Mr. Silverman, the president of Devotion, "solicit a third party to issue a personal check", and that she had asked Silverman to get third party checks made out to the Colman campaign as political donations on behalf of Orange & Rockland Utilities, which she describes in her testimony as being, "the true contributor". She testified that she had done so to the knowledge of Mr. Colman. The attorney for Ms. Winikow told the Court that the pleas of guilty, "cover all matters that

Mrs. Winikow has told the District Attorneys Office about, to include expense account violations and other election law violations under State of New York laws". (Transcript at p. 37).

The plea allocution made clear at several points through statements by the Justice presiding, that it was contemplated that Ms. Winikow would be a cooperating individual against others, and that her sentence was to be put off until all such matters had been resolved.

From the foregoing it appeared clear to the plaintiffs that they were targets of a Grand Jury investigation and possible State prosecution. Indeed, this fact was confirmed as of October 19, 1993, in the affidavit of Kenneth Gribetz, filed as Document 10 in this case.

By motion dated October 12, 1993, Sluys sought a preliminary injunction preventing Gribetz from, "presenting to the Grand Jury or in any other way prosecuting the plaintiff for the crime of Commercial Bribe Receiving under New York State Penal Law 180, or the crime of Coercion under § 135.60" based upon the incidents referred to in the plea allocution of Ms. Winikow. The basis for the preliminary injunction, and the bases for this lawsuit itself, was a claimed violation of the rights of plaintiff under the First and Fourteenth Amendments.

A hearing was held October 25, 1993 on the return of the motion for a preliminary injunction. At the conclusion of the hearing, the motion was denied, "with leave to renew upon a clear showing of action by any defendant having a genuine threat to chill the First Amendment rights of the plaintiff." Plaintiff, Sluys, was in effect invited to return to this Court were he indicted. Thereafter, Rockland County District Attorney Gribetz made a public announcement on

November 16, 1993 that he would not prosecute Sluys or Aldrich. His press release advised, in relevant part, as follows:

> "Gribetz said that, a special grand jury probing corruption [at Orange & Rockland Utilities would not hear evidence against Community Media, Inc. of Pearl River or its employees, saying that constitutional issues made prosecution impossible.'
>
> The District Attorneys Office has concluded that on constitutional grounds, particularly the First Amendment of the U.S. Constitution, Community Media or its employees cannot be successfully prosecuted', Gribetz said in a statement."

Clearly, this conclusion was correct.

The constitutional protections afforded the dissemination and acquisition of information (news), as pointed out by then Chief Judge Kaufman in Herbert v. Lando, 568 F.2 974, 978 (2d Cir. 1977, reversed on other grounds, 441 U.S. 153) recognize that the editorial process also must be safeguarded. In Chief Judge Kaufman's words, "The media is not a conduit which receives information and, senselessly, spews it forth. The act of exercise of human judgment must transform the raw data of reportage into a finished product. The Supreme Court cases which grant protection to the editors so shaping the news are unequivocal in their terms."

For example, in Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974), cited Herbert v. Lando, supra, the Supreme Court held that a publication could not be

compelled by the State to accept editorial replies. The court recognized that the treatment of public issues and officials - whether fair or unfair - constituted the exercise of editorial control and judgment, and that the existence of a right of reply statute would unconstitutionally burden an editor's exercise of judgment in choosing whether or not to print a newsworthy material.

An editor is confronted each day of publication with a large news "hole", representing those column inches of the publication not devoted to advertising and editorials, which must be filled with news. It is or should be obvious that in making a judgment as to what stories go in the news hole and what stories are spiked, the editor exercises a judgment protected by the First Amendment. Furthermore, we should understand that it is impossible to write a news story without slanting the news in some fashion, by choice of words, punctuation, emphasis, the order in which the facts are stated, or by numerous other ways and means, intentional and unintentional.

Accordingly, it is not possible for anyone, including a grand jury, a trial jury, or a prosecutor, to ascertain whether the news columns of a particular publication have been made "favorable" or "unfavorable" to the management of a public utility, or whether unfavorable news has been withheld as part of a corrupt bargain paid for indirectly by advertising, or as a result of an honest editorial judgment as to the "newsworthiness" of a particular episode concerning the utility, compared to other events competing for coverage on that day.

The theory of any prosecution based on an agreement to refrain from publishing adverse news or comment concerning a public figure or an enterprise affected by the public interest such as Orange & Rockland Utilities, must of

necessity consider whether the alleged agreement was actually performed. To do this, a court or jury must, of necessity, intrude into the editorial judgment protected by the First Amendment of the Constitution. As stated in Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, quoted in Herbert v. Lando, supra, "For better or worse, editing is what editors are for, and editing is selection and choice of material."

We quote further from Herbert v. Lando:

> "It is clear from what we have said that newsgathering and dissemination can be subverted by indirect, as well as direct, restraints. It is equally manifest that the vitality of the editorial process can be sapped too if we are not vigilant. The unambiguous wisdom of Tornillo and CBS is that we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself. In the light of these constitutional imperatives, the issue presented by this case is whether, and to what extent, inquiry into the editorial process, conducted during discovery in a New York Times v. Sullivan libel action, impermissibly burdens the work of reporters and broadcasters.

This case is stronger than Herbert which involved a libel action and was reversed by the Supreme Court in order to be consistent with the Sullivan rule. In the instant case, a criminal prosecution was apparently sought to be maintained on the theory that the editorial process had been distorted in order to favor an advertiser. The very inquiry into the editorial process necessary to prosecute or defend such a case violates the constitutional protection granted to an editor by

Tornillo, Columbia Broadcasting, and Herbert v. Lando.

That this clear legal impediment to the proposed prosecution was recognized, somewhat belatedly, by the District Attorney of Rockland County, in this Court's opinion moots the case as to Sluys and Aldrich. We would consider them prevailing parties, and were they represented by counsel an award of legal fees might be appropriate. Insofar as concerns Grant, in addition to being moot the complaint fails to state a claim upon which relief can be granted.

The Clerk of the Court is directed to enter Judgment dismissing the action with prejudice, and without costs.

SO ORDERED.

Dated: White Plains, New York
January 31, 1994

Charles L. Brieant
U.S.D.J.

Appendix C

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

George Lange III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the **second** day of **November** , one thousand nine hundred and **ninety-four**

PETER SLUYS, Esq., and ARTHUR R. ALDRICH,

Plaintiffs-Appellants,

v.

JOHN T. GRANT ,

Defendant,

KENNETH GRIBETZ, as District Attorney
of the County of Rockland, and
KENNETH GRIBETZ, personally, PETER MODAFERRI
and SIX OTHER UNKNOWN CONSPIRATORS,

Defendants-Appellees.

A Petition for rehearing having been filed herein by the pro se appellants Peter W. Sluys, Esq. and Arthur R. Aldrich,

Upon consideration by the panel that decided the

appeal, it is ordered that said petition for rehearing is DENIED.

FOR THE COURT

GEORGE LANGE III, Clerk

by Carolyn Clark Campbell
Chief Deputy Clerk

Inbanc Order Denied

APPENDIX D

The First Amendment [ratified December 15, 1791]: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Seventh Amendment [ratified December 15, 1791]: "In suits at common law where the value and controversy shall exceed $ 20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, then according to the rules of the common law.

No. 94-1324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MAR 1 1995
OFFICE OF THE CLERK

PETER W. SLUYS,

Petitioner,

ARTHUR R. ALDRICH,

Petitioner,

vs.

JOHN T. GRANT,

Respondent,

KENNETH GRIBETZ, as District Attorney of the County of Rockland, and KENNETH GRIBETZ, personally, PETER MODAFFERI and SIX OTHER UNKNOWN CONSPIRATORS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT KENNETH GRIBETZ'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the District Court and Second Circuit properly dismiss as moot this action -- which had been commenced in order to enjoin Petitioners' prosecution -- after the District Court found that there had been no violation of Plaintiffs' rights to date and after Defendant Gribetz then indicated that there would be no prosecution of Petitioners?

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PRELIMINARY STATEMENT

Respondent Kenneth Gribetz submits this Brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners Peter W. Sluys and Arthur R. Aldrich ("Petitioners"). As discussed below, Judge Charles L. Brieant, of the Southern District of New York, properly dismissed this action on the grounds of mootness. The Second Circuit thereafter affirmed Judge Brieant's dismissal of this action.

Petitioner Peter W. Sluys commenced this action in order to seek a preliminary injunction enjoining any prosecution of him by the Rockland County District Attorney's office.[1] Judge Brieant denied Petitioner's motion since no indictment had yet been issued by the District Attorney's office, declaring that "[t]here's no indication of anything inappropriate up till now." At the same time, Judge Brieant indicated that Petitioner Sluys would have the right to seek further relief in the event that a prosecution was actually commenced against him.

Subsequently, however, Defendant Gribetz announced that there would be no prosecution of Petitioners by the Rockland County District Attorney's office. The District Court thereafter issued its Decision and Order dismissing this case as moot.

The fact is that Petitioners commenced this action in order to prevent their prosecution by the Rockland County District Attorney's Office. Defendant Gribetz has indicated that there will be no such prosecution, and therefore there is now no longer -- if there ever was -- any live action or

---

[1] As set forth below, after Petitioner Sluys commenced this action, Petitioner Aldrich intervened as a party Plaintiff seeking the same relief as Petitioner Sluys.

controversy which would warrant continuation of the proceedings. While Petitioners continue to argue that Judge Brieant concluded that their constitutional rights had been violated, the Second Circuit correctly observed that "Judge Brieant found that appellants' rights had not been violated [and that therefore] the basis of their appeal is mistaken." Second Circuit Decision at 4a.

Accordingly, Petitioners' appeal is entirely meritless, and the Judgment of the District Court and the Opinion of the Second Circuit should be affirmed.

STATEMENT OF THE CASE[2]

Background

During the summer of 1993, the Rockland County District Attorney's office was in the process of conducting an investigation into a variety of matters. The investigation involved, among other things, a review of a number of transactions, including payments made by Orange & Rockland Utilities ("O&R") to Community Media, Inc. ("Community Media"), the company for which Petitioner Sluys is the Managing Editor and Petitioner Aldrich is the Publisher.

Pursuant to this investigation, a Superior Court Information was issued with respect to Linda Winikow, a former Vice-President of O&R. The Information made specific reference to Ms. Winikow's agreement, in violation of Section 180.05 of the Penal Law (commercial bribe receiving

---

[2] Petitioners' Statement of the Case contains a number of "facts" which are not part of the Record, many of which are irrelevant, inaccurate or both. Plaintiffs are simply seeking to deflect this Court's attention from the unassailable and quite straightforward facts which led Judge Brieant to dismiss this action and the Second Circuit to affirm that dismissal.

in the second degree), to enter into advertising contracts with Community Media on behalf of O&R. In return, Community Media would cease negative press coverage about O&R.

On October 6, 1993, Ms. Winikow pled guilty to several charges, including the charge of commercial bribe receiving in the second degree relating to the advertising contracts with Community Media. In entering her plea on the charge, Ms. Winikow confirmed that she had entered into advertising contracts on behalf of O&R with Community Media in return for Community Media's promise to cease negative press coverage of O&R.

Ms. Winikow also allocuted that the contract was entered into pursuant to discussions she had held with representatives of Community Media, including Petitioners Sluys and Aldrich. Ms. Winikow admitted that she "never would have" entered into this contract were it not for the promise by Community Media to cease negative media coverage of O&R and its principals.

In view of the evidence surrounding the investigation into the transactions involving O&R which resulted in Ms. Winikow's guilty plea, a grand jury with respect to these and other matters was impaneled on October 5, 1993. The grand jury was in the process of assessing all of the evidence being presented to it when Petitioner Sluys commenced this action by moving for a preliminary injunction which would enjoin any prosecution against him by the District Attorney's office.[3]

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[3] Plaintiff Aldrich later intervened in this action as a party Plaintiff.

Petitioners' Motion for a Preliminary Injunction Is Denied

The motion for a preliminary injunction was fully briefed and was heard by Judge Brieant on October 25, 1993. Judge Brieant denied Petitioner Sluys' motion, indicating the motion was not "ripe" because "there's no indictment" and stating that "there's no indication of anything inappropriate up till now." *See* Second Circuit Opinion at 3a. Judge Brieant added that "it may be that you have a basis for some relief in this Court, but that would be anticipating the future," adding that he might revisit the issue in the event an actual prosecution was instituted.

Defendant Gribetz Decides Not to Prosecute Petitioners

Subsequently, in a statement issued on November 16, 1993, Defendant Gribetz made it clear that there would be no prosecution of Petitioners. In the press release announcing the decision not to prosecute Petitioners, the District Attorney's office stated as follows:

> District Attorney Kenneth Gribetz has announced that after fully reviewing the actions of Community Media and its employees in regard to its relationship to Orange and Rockland Utilities of Pearl River, New York, that the investigation is completed and no criminal charges will be filed against the corporation or its employees.
>
> After a thorough review of all of the evidence and discussions with numerous witnesses, the District Attorney's office has concluded that on constitutional grounds, particularly the First Amendment of the United States Constitution, Community Media or its employees, cannot be successfully prosecuted.

> Accordingly, the investigation is closed and matters related to the relationship of Orange and Rockland Utilities and Community Media will not be presented to a Rockland County grand jury for their review and consideration.

As this statement made clear, the Rockland County District Attorney's office had simply done its job: it had investigated the facts, including the facts surrounding Ms. Winikow's guilty plea, and concluded that no criminal charges would be brought against Petitioners or Community Media.

Justice Brieant Dismisses The Action as Moot

In view of the decision by the District Attorney's office not to prosecute Petitioners, Judge Brieant issued a Memorandum and Order dated November 17, 1993 in which the Court invited the parties to show cause why the action should not be dismissed as moot. The parties in fact appeared before Judge Brieant on December 8, 1993 in order to address this issue.

By Decision and Order, dated January 31, 1994, Judge Brieant, citing the decision of the District Attorney's office not to prosecute Petitioners, dismissed this action with prejudice on grounds of mootness. Judgment was entered on January 31, 1994 dismissing this action.

The Second Circuit Affirms Justice Brieant's Dismissal of This Action

By way of a Decision dated September 29, 1994, the Second Circuit affirmed Justice Brieant's Decision. In so doing, the Second Circuit made it clear that Judge Brieant had found "that no constitutional violation had occurred in the incipient stages of the investigation ...." Second Circuit Opinion at 2a. Indeed, the Second Circuit stated as follows:

> There was *no* finding that Plaintiffs' constitutional rights were violated: on the contrary, Judge Brieant

> found that, as the investigation has scarcely begun, the plaintiffs' rights had not been violated. The court stated, "One of the problems is that nothing, as far as I can see, has happened to [plaintiffs] ... [T]here's no indication of anything inappropriate up till now.

Second Circuit Opinion at 3a (emphasis in original).

ARGUMENT

THE SECOND CIRCUIT CORRECTLY AFFIRMED JUDGE BRIEANT'S DISMISSAL OF THIS ACTION ON GROUNDS OF MOOTNESS.

The related doctrines of ripeness and mootness are rooted in Article III of the Constitution, as well as principles of judicial economy. In either case, federal courts will not retain jurisdiction over matters which do not present a live action or controversy.

The Supreme Court has established a clear standard for determining whether a case is ripe:

> Basically, the question in each case is whether ... there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). In applying this standard, the Supreme Court, in *Juidice v. Vail*, 430 U.S. 327 (1977), stated that since many of the individuals involved in that case were no longer threatened with criminal prosecution, a live controversy no longer existed as to them.

With respect to the doctrine of mootness, this Court has stated:

> A case becomes moot "when the issues presented are no longer 'live' or the parties 'lack a legally

> cognizable interest in the outcome.' " (*Blackwelder v. Safnauer*, 866 F.2d 548, 551 (2d Cir. 1989)) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (per curiam)); *see also Jefferson v. Abrams*, 747 F.2d 94, 96 (2d Cir. 1984). When this occurs, the Constitution's case or controversy requirement, U.S. Const. Art. III, § 2, is not satisfied and a federal court lacks subject matter jurisdiction over the action. (citations omitted). A moot action therefore must be dismissed, even if the case was live at the outset but later events rendered it moot .... *see Jefferson*, 747 F.2d at 96.

New York City Employees' Retirement System v. Dole Food Co., 969 F.2d 1430, 1433 (2d Cir. 1992). *See also Cook v. Colgate University*, 992 F.2d 17 (2d Cir. 1993); *Fox v. Board of Trustees of the State University of New York*, 148 F.R.D. 474, 483 (N.D.N.Y. 1993), *aff'd* 42 F.3d 135 (2d Cir. 1994) ("[W]hen an action becomes moot, it no longer presents a live case or controversy, and thus ... a federal court *must* dismiss that case because it lacks subject matter jurisdiction to entertain it.") (emphasis added).

Here, Petitioners are attempting to resuscitate a case which is not -- if it ever was -- ripe. This case was brought to prevent Petitioners' prosecution, and the Rockland County District Attorney's office has now confirmed that there will be no such prosecution. Accordingly, the purpose for this action no longer exists, and Judge Brieant correctly dismissed this action on grounds of mootness.

As the Second Circuit Opinion notes, Petitioners' attempt to reactivate this case despite the fact that the case is clearly moot is premised upon a fundamental misinterpretation of Judge Brieant's Decision. While Petitioners would have this Court believe that Judge Brieant somehow found that Petitioners' constitutional rights have been violated, Judge

Brieant made no such determination. To the contrary, the very point of Judge Brieant's Decision is that, in view of the indication that Petitioners would not be prosecuted by the Rockland County District Attorney's office, there can and will be no violation of Petitioners' rights. Indeed, while Petitioners' Petition states "that the District Attorney had committed offenses which violated the civil rights of your Petitioners," (Petition at 14) the Second Circuit made it clear that Judge Brieant had expressly "found that appellants' rights had not been violated." Second Circuit Opinion at 4a.

When Petitioner Sluys (before Petitioner Aldrich intervened as a party) sought a preliminary injunction at the time this action was commenced, Judge Brieant properly denied the motion for a preliminary injunction, noting that no indictment had yet been handed up, specifically stating that "there's no indication of anything inappropriate up till now." Second Circuit Decision at 3a. In other words, at the time the matter was brought before Judge Brieant by Petitioner Sluys -- *after* the investigation concerning the relevant events had been commenced by the Rockland County District Attorney's office and *after* the grand jury had been impaneled -- Judge Brieant found that there had been no wrong committed to that point.

The investigation by the Rockland County District Attorney's office concerning the transactions between Community Media and O&R resulted in a guilty plea by Ms. Winikow to commercial bribe receiving in the second degree. As the chief law enforcement officer in Rockland County, Mr. Gribetz was, of course, duty bound to conduct a full investigation into the circumstances surrounding those transactions. It goes without saying that an investigation into events cannot be equated with an actual prosecution of an individual: it is normal and expected that, as happened here, investigations will be conducted which in the end do not result in any prosecution.

The clear import of Judge Brieant's Decision was that had an actual prosecution been commenced against Petitioners, their First Amendment rights may have been implicated. It was for this very same reason that Defendant Gribetz determined that no prosecutions would be pursued against Petitioners.[4] As such, there was at no time any violation of Petitioners' constitutional rights.

Accordingly, each of the cases cited and relied upon by Petitioners are readily distinguishable. In each of those cases, the issue was the relief available in the event that a finding were made that there had been a violation of the constitutional rights of the plaintiffs. *See, e.g., Farrar v. Hobby*, 506 U.S. _____, 113 S. Ct. 566 (1992) (damages premised on finding of violation of civil rights); *Carey v. Piphus*, 435 U.S. 247 (1978) (plaintiffs' rights had already been violated and therefore damage claim allowed to proceed); *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978) (damage claim allowed to proceed where an action had already been commenced by the defendant and where a violation of Petitioner's rights had already occurred).

Here, on the other hand, there has been no violation of Petitioners' rights and there will be no violation of their rights due to the decision which has been made not to prosecute Petitioners.[5] In these circumstances, Judge Brieant correctly concluded that there was no longer any live action

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[4] The outright confirmation that there will be no prosecution of Plaintiffs distinguishes this action from the cases where the imminent threat of prosecution made those cases ripe for adjudication.

[5] At any rate, a state prosecutor is entitled to absolute immunity with respect to § 1983 damage liability for acts relating to his role as advocate for the State and officer of the courts. *See Imbler v. Pachtman*, 424 U.S. 409 (1976).

or controversy before him and therefore properly dismissed this case on grounds of mootness.

Equally unavailing is Petitioner's attempt to rely upon Judge Brieant's reference to the Petitioners as potentially being "prevailing parties" who, if they had been represented by an attorney, might be entitled to recovery of attorneys' fees. As the Second Circuit made clear, Petitioners incorrectly imply that Judge Brieant's statement somehow constitutes a finding that there had been a violation of their rights. Instead, as the Second Circuit noted, the reason for Judge Brieant's statement is simply that "by bringing their suit, [Petitioners had] accomplished at least one of [their] goals." Second Circuit Opinion at 4a. However, this does not change the fundamental fact that Judge Brieant had already found that Petitioners' rights had not been violated.

CONCLUSION

Judge Brieant properly dismissed this action -- commenced to prevent Petitioners' prosecution -- on grounds of mootness. In view of the indication by the Rockland County District Attorney's office that there will be no prosecution of the Petitioners, no viable claim remains.

In turn, the Second Circuit correctly observed that Judge Brieant had found that Plaintiffs' constitutional rights had not been violated, and as a result affirmed Judge Brieant's dismissal of this action.

The Judgment of the District Court and the Second Circuit's Opinion should be affirmed in their entirety.

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February 27, 1995

Respectfully submitted,

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